No. 98-1848

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CLERK

In The
Supreme Court of the United States

COUER D'ALENE TRIBE,
Petitioner,

v.

STATE OF MISSOURI EX. REL.
JEREMIAH (JAY) NIXON,
Respondent.

On Petition for Writ Of Certiorari to the United States Court Of Appeals for the Eighth Circuit

REPLY RE: MOTION TO GRANT, VACATE AND REMAND

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By motion, Petitioner, Coeur d'Alene Tribe (Tribe), has asked this Court to grant its Petition For Writ Of Certiorari, vacate the decision of the Court of Appeals for the Eighth Circuit and remand the case for implementation of the procedure articulated in the recent decision of *Ruhrgas AG v. Marathon Oil Co., et al*, 1999 WL 303676 (U.S. Tex.) dated May 17, 1999.[1] Specifically, the Tribe seeks to have the case remanded so that the district court can exercise its discretion to dismiss the case on straightforward personal jurisdictional grounds as mandated by *Ruhrgas*, rather than being required to resolve a more difficult and novel question of subject matter jurisdiction as mandated by the circuit below.[2]

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[1] The relief requested in this motion is in the alternative to the relief requested in the Petition For Writ Of Certiorari. In the Petition the Tribe presents two questions. The first addresses a question regarding dismissal under Fed.R.Civ.P. 41 on which the circuit below is in conflict with other circuits. The second addresses a question of claim splitting and lack of federal judicial review at any level of as important federal question. Missouri has chosen not to respond to the Tribe's Petition. See Missouri letter of June 2, 1999. The Petition is therefore fully presented for consideration.

[2] The straightforward personal jurisdictional ground is an Indian tribe's sovereign immunity from suit. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751 (1998) (tribal sovereign immunity bars suit regarding off-reservation commercial conduct). The district court initially dismissed the Tribe on this sovereign immunity ground, even before *Kiowa*. Pet. Writ of Cert. App. 24, 26-29. The circuit reversed, holding that the district court was first required to address the subject matter jurisdiction issue. This is the exact procedure which was struck in *Ruhrgas*. Pet. Writ of Cert. App. 1, 13.

The difficult and novel question of subject matter jurisdiction is whether the Internet gaming activity in question takes place "on Indian lands" within the meaning of the completely preemptive Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq., 2710(d)(1). This issue involves complex factual and legal questions of 1) the deference to be afforded the determination of the federal commission charged with authority over Indian gaming matters that a similar game was conducted

Respondent, State of Missouri (Missouri) has chosen to not directly address the Tribe's argument that the circuit required the exact procedure struck down by *Ruhrgas*. Instead, Missouri has responded by first overstating the relief requested by the Tribe, then by asserting that the relief requested is barred by *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 842 (1989) (question of Indian tribal sovereign immunity alone cannot form the basis of removal) and finally by arguing that the Tribe has caused its own problem.

Missouri mischaracterizes the relief requested by this motion when it states:

> The Tribe asserts that the district court cannot proceed to hear evidence and decide the issue of complete preemption and federal subject matter jurisdiction before it addresses the Tribe's allegation of immunity.

Missouri's Response To Motion To Grant, Vacate And Remand, p. 3.

This is not correct. The Tribe does not seek to have the district court required to first consider the sovereign immunity issue. The Tribe only asks that the district court have discretion to consider the straightforward personal jurisdiction question of sovereign immunity before it considers the more difficult and novel subject matter jurisdiction question of the location of Indian gaming transactions conducted over the Internet. *Ruhrgas* requires this discretion. *Ruhrgas* specifically rejected the rigid decisional hierarchy of always considering subject matter

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"on Indian lands", *see Chevron, USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (federal agency interpretations entitled to deference), 2) the location of the elements of commerce conducted over the Internet, 3) the location of the elements of gaming and 4) the reach of preemptive congressional regulation under the Indian Commerce Clause.

jurisdiction before any consideration of personal jurisdiction. The circuit below required the same rigid hierarchy rejected in *Ruhrgas*. The Tribe only seeks to allow the district court the discretion required by *Ruhrgas*.

Missouri next argues that the relief requested by the Tribe is barred by *Graham*. *Graham* held that the federal question of Indian tribal sovereign immunity was insufficient to form the sole basis for removal of a state court action which otherwise presented only questions of state law. *Graham* was based on the well-pled complaint doctrine. *Graham* at 840-841.

In this case, removal is not based on sovereign immunity. Rather removal is based on the complete preemption/artificial pleading corollary to well-pled complaint rule, *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), (removal from state court is appropriate if "the plaintiff's right to relief necessarily depends on resolution of a substantial federal question"), *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 118 S.Ct. 921 (1998), ("[I]f a court concludes that a plaintiff has 'artfully pled' claims [by omitting to plead necessary federal questions] it may uphold removal even though no federal question appears on the face of the plaintiff's complaint"). The substantial, necessary federal question that Missouri omitted from its complaint by artful pleading is whether the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. (IGRA), completely preempts state regulations of Indian gaming. Missouri's reliance on *Graham* confuses the personal jurisdiction concept of tribal sovereign immunity with the subject matter jurisdiction concept of complete preemption by the federal statute (IGRA), which totally precludes state regulation of a field of endeavor – in this case Indian gaming. The complete preemption of IGRA justifies removal. Sovereign immunity is only a straightforward personal jurisdiction theory that can be considered by the district court as an alternative

method of disposing of the case under *Ruhrgas*.

The *Ruhrgas* decision is particularly important in this case. The district court previously dismissed the Tribe on sovereign immunity grounds, even before *Kiowa*. Pet. Writ of Cert. App. 24, 26-29. The district court is addressing the subject matter jurisdiction question on remand only because of the circuit's directive that subject matter jurisdiction must be addressed before sovereign immunity. Pet. Writ of Cert. App. 1, 13. In other words, the district court is now proceeding with the subject matter jurisdiction issue only because the circuit denied the discretion that *Ruhrgas* requires.

Finally, Missouri argues that the Tribe has created its own problem by seeking the hearing it now tries to stop. This is not correct. The current proceeding in the district court is not taking place at the Tribe's request. It is occurring only because of the circuit's directive. The Tribe's position is that the district court should be allowed to exercise its discretion to dismiss the case on a straightforward personal jurisdiction ground (tribal sovereign immunity) as required by *Ruhrgas*.

Missouri's arguments opposing the Tribe's Motion to Grant, Vacate and Remand are without merit. The circuit below has required rigid decisional hierarchy rejected in *Ruhrgas*. The Tribe asks that its Petition For Writ Of Certiorari be granted, the decision of the circuit be vacated and the matter be remanded with directions to further remand to the district court to allow the discretion required by *Ruhrgas*.

Respectfully submitted,

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